IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SEDCOND APPEAL NO. 111 of 1990

1. Samullakhana Kalimullakhan

2.Saifullakhan Kalimullakhan

3. Smt. Sah Mukramali

4. Smt.Khurshid Begum Malimullah ..Appellants

V/s

1. Daud Ismail

2. Asadullakhan Kalimullakhan ..Respondents

Shri P.B.Shah for Appellnats

Ms A.R.S.Baxi for Respondent no.1.

CORAM:S.R.SATHE,J.

DATED:19th August 2004

ORAL JUDMENT :-

1. Being aggrieved by the judgment and order passed by the Court of 7th Additional District Judge, Pune in Civil Appeal No.128 of 1985 whereby the order passed by the Court of Joint Civil Judge, S.D., Pune in Special Civil Suit NO.134 of 1980 decreeing the plaintiffs suit for possession was dismissed, the

plaintiffs have preferred this second appeal. For the sake of convenience hereinafter the parties shall be referred to as the plaintiffs and defendants.

2. Brief facts giving rise to this second appeal are as under :-

. The property bearing NO.569, Sachapir Street, Cantonment, Pune was initially owned by one Abdul Gani. He sold the said property to one Kalumullakhan by virtue of registered sale deed dated 1-1-1957. Northern front portion consisting of 1 Khan described in detail in para 1 of the plaint was in possession of defendant no.1 as a tenant. It is plaintiff's case that on 1-10-1957 the defendant executed rent note in favour of Kalimullah khan. According to the plaintiffs in January 1978 when he visited the suit property he found that the defendant had made encroachment in the rear portion i.e. southern portion of the suit property. The plaintiff therefore issued notice 9-4-1979 to the defendant no.1 and called upon him to remove the encroachment. The defendant gave reply through the Advocate and refused to vacate the alleged encroached portion. Hence the plaintiff filed the present suit for possession on the basis

of title.

3. The defendant no.1 filed his written statement at Exh.12 and opposed the suit claim. He contended that entire suit house bearing CTS No.569 Sacha Peer in his possession as a tenant and as such it cannot be said that he has made any encroachment as alleged by the plaintiff. He further contended that since the year 1949 there was a shop under the name and style "Dawood Ismail and Co". The defendants started this shop at the said place at monthly rent of Rs.30/-. He further contended that though in the rent receipt, the description of the property is shown as front portion, actually entire property was in fact leased out to him but as the rear portion was an open space and it was being used for storing the boxes, the rent receipt showed that only front portion i.e. shop portion was leased out to him. He also contended that written permission by the landlord to remove the dividing wall in between front portion and rear portion at his cost was granted to him. He also raised several other contentions with regard to the maintainability of the suit.

4. On these pleadings the trial Court framed issues. After considering the evidence adduced by

both the parties the trial Court came to the conclusion that the plaintiff has proved the alleged encroachment. He therefore decreed the plaintiff's suit.

5. Being aggrieved by the same the defendant filed appeal bearing Appeal No.128 of 1985 in the District Court at Pune. The first Appellate Court came to the conclusion that the plaintiff has failed to comply with the mandatory provisions of Order 7 Rule 3 of C.P.C. inasmuch as the plaintiff did not file any plan of the suit property and the suit is not maintainable. Besides this, he also held that the plaintiff has failed to prove that defendant has made an encroachment in the suit building. He therefore, allowed the appeal and dismissed the plaintiff's suit.

6. Being aggrieved the plaintiff filed the present appeal.

7. From perusal of the record it appears that this Court passed the following order on 25-6-1990.

> On the newly added grounds, which are substantial questions of law, appeal admitted.

The said added grounds are as follows :-

1 Whether the lower appellate court was right in holding that the provisions of Order VII Rule 3(Bombay Amendment) of C.P.C. are mandatory, and that non compliance with the same entail dismissal of the suit?

2. Whether the lower appellate court was right in permitting the Defendant to raise a contention of alleged non compliance of order VII Rule 3 for the first time in Appeal, and that too only across the bar, particularly when the identity of the property was not in dispute at any time?

3. Whether the lower appellate Court was right in dismissing the plaintiff’s suit for non compliance with order VII Rule 3 without giving the plaintiffs opportunity of comply with the said provisions?

4. Whether the lower appellate Court was right in not framing any point or issue regarding the main controversy between the

parties namely whether defendant is a tenant only in shop premises or also of the open space in the rear portion?

5. Whether the lower appellate court was right in dismissing the suit only on the ground that the defendant was in possession of several years, particularly when the suit was on title and the defendant was unable to establish any title to suit property?

6. Whether the lower appellate court was right in holding that in order to recover the possession, the plaintiffs will have to adopt different remedy, or that the plaintiff's claim is barred by limitation?

8. In this appeal before me, the learned Advocate for the Appellants-plaintifs has urged two points. Firstly, he submitted that there was no necessity for the first appellate Court to take into consideration the provisions of Order 7 Rule 3 of C.P.C. because in the trial Court no contention was raised by the defendant to that effect. Secondly, he canvassed before me that even if for the sake of argument it is held that the proper description was

not given and it was necessary for the plaintiff to produce the plan showing the suit property, still then it was not legal and correct on the part of the first appellate Court to dismiss the suit on that ground without giving opportunity to the plaintiff. He also submitted that defendant had failed to show that entire suit house i.e. 569 Sacha Peer was leased out to him nor there is any evidence to show that defendant was using the said portion with permission of the plaintiff landlord or previous landlord. He therefore submitted that the finding recorded by the first appellate Court is not legal and correct and the same be set aside. As against this the learned Advocate for the Respondent defendant supported the judgment and order passed by the first appellate court.

9. It is not in dispute that the defendant had executed rent note in favour of the landlord viz. Kallimullakhan on 1-10-1957. Naturally it is essential to find out as to what exact portion was leased out to defendant under the said rent note. The rent note is produced at Exh.33. In that rent note it is clearly mentioned that one Khan premises facing northern side is leased out to the defendant as a tenant. Not only that but boundaries of the leased out portion have been mentioned in the said

rent note. The same are as under :-

(Towards East House No.5 60A
Towards South Open Space (North) of the suit house
Towards West House NO.570
Towards North Sacha Peer Street).

10. The bare reading of these boundaries would indicate that there was some open space or portion towards the South side of the leased property which was forming part and parcel of the property NO.569, Sacha Peer Street and it was not leased out to the defendant. Now, when the plaintiff has averred that defendant has made an encroachment in the rear portion of the tenanted premises or One Khan premises on the Northern side, obviously he was expected to specifically mention the area of the encroached portion. It is true that he has not specified such area, however, that by itself is not sufficient to jump to the conclusion that the

description of the property given by the plaintiff is not sufficient so as to identify the exact portion in respect of which there is a dispute between the parties. Ultimately provision of Order 7 Rule 3 of C.P.C. is only with a view that there should not be any dispute about the identification of the property, means the exact portion or property in respect of which relief is sought for should be clear. So, it is necessary for us to find out whether the description which is given in the plaint would be sufficient to locate the actual portion in respect of which relief is sought. It would be worthwhile to see what amended Order 7 Rule 3 says. It reads as under :-

Order 7 - Rule 3-

> 3. Where the subject matter of the suit is immovable property - where the subject matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers. In case of encroachment a sketch showing as

approximately as possible the location and extent of encroachment shall also be filed along with the plaint.

. Even Order 7 Rule 3 says that the description of the property should be such it would be sufficient to identify it. As stated by me above, if we compare the boundaries of tenanted premises which are available, in the admitted document, rent note - Exh.33 and the boundaries of the encroached portion given by the plaintiff in the plaint, it is very clear that there is no ambiguity and one can easily identify that the encroached portion is in between the tenanted premises i.e. north one Khan portion leased out to the defendant no.1 and open space beyond that upto the lane. It does appear that at the Southern side there is one gate or door. So, dispute is in respect the property which is in between lane and southern wall of the tenanted premises.Thus when the encroached portion in respect of which the suit was filed was easily identifiable, there was no propriety in saying that the suit was not maintainable because of the fact that the plaintiff had not given the sketch of encroached portion. If really the defendant was unable to know the property in respect of which the plaintiff had filed the suit then certainly the defendant would

have raised the contention to that effect. But that has not happened. On the contrary if we take into consideration the oral evidence adduced by both the parties then also it is clear that there was no ambiguity about the identification of the property in question. Considering this aspect I am of the view that finding recorded by the learned first appellate Court that the suit was not maintainable for want of sketch is not legal and correct.

11. The learned advocate for the parties has placed reliance on a case Pratibha Singh and Another V/s Shanti Devi Prasad and another reported in (2003) 2 Supreme Court Cases 330 wherein the apex Court has observed that map of the suit property should be filed with the plaint, when sub plot numbers mentioned to describe the property were not capable of being identified merely by boundaries nor by numbers as those numbers did not appear in records of settlement or survey. From the reading of this case it is clear that the description given in the plaint and other material on record is sufficient to identify the property in question, there is no need to insist on the map and at any rate to dismiss the suit on that count.

12. The main and material question is whether the

plaintiff has proved that defendant has made an encroachment in the rear portion. First, it has to be mentioned that plaintiff has taken a definite stand that the said rear portion was never leased out to the defendant. However, the defendant is in fact not consistent in his stand. In written statement he had contended that entire suit house bearing No.569, Sacha Peer Street, Pune has been leased out to him. Then at one point of time he took the contention that only one khan premises was leased out to him but he was using the rear portion of the suit premises with the permission of the then landlord. the at third stage he has come out with a case that the said portion was in his use for last several years and at no point of time the landlord objected for the same. So far as the first contention is concerned rent note Exh.33 is the complete answer to the same. If really such portion would have been leased out to the defendant then certainly we would have found some mention of it the rent note, but it is not so. On the contrary, in the rent note as well as in the rent receipts it has been specifically mentioned that northern front portion has been leased out to the defendant.

13. So far as second theory of permission by the landlord is concerned, we find that the defendant

no.1 has not adduced any evidence to show that either Kalimullakhan or his predecessor had in fact given specific permission to use the rear open space. Merely because of the fact that the previous landlord had permitted him to pull down the southern dilapidated wall which was in between the rear portion and tenanted premises, we cannot jump to the conclusion that permission was given by landlord to him to use rear portion.. Firstly it has to be mentioned that the alleged written consent in that behalf is not produced on record of this suit. Besides this even if we assume that the said letter can be considered it appears that admittedly in that letter it was never mentioned that defendant is permitted to use the rear portion i.e. open space on the southern side of the tenanted premises. All that was permitted was to pull down the southern wall and that too because it had become dilapidated. It is not even the case of defendant that such permission was given because defendant wanted to use the rear portion and for his convenience the said wall was allowed to be pulled down. So, there is absolutely no evidence to hold that defendant was permitted to use the portion which was on backside of tenanted premises.

14. An attempt was made to show that defendant no.1

was using the said rear portion for several years for keeping boxes. But for this also there is no cogent evidence. He has no where specifically stated as to since when he started using the said portion and whether the landlord had in fact knowledge that he was using such portion and having such knowledge the landlord kept mum and did not take any further action against him, thereby, showing implied consent. However in this respect also the defendant n.1 has not adduced any evidence. Merely because he is having his shop at the said premises for last 40/50 years we can not hold that rear portion was also in his possession and that too with the consent of the landlord for the said period.

15. There is another important aspect of the matter. Had it been a situation that there was absolutely no independent access to the open space that is rear portion of tenanted premises then perhaps it would be argued that premises which was let out to him must be inclusive of rear portion. But, from the evidence on record it is very clear that on the southern side of this property there is a door and for that door the approach road is from lane. So under such circumstances it is very difficult to believe that rear portion was also

leased out to the defendant. On the contrary it appears from the record that when the plaintiff found that defendant has closed that door from inside, plaintiff immediately took action. This also indicates that southern portion must not have been leased out to the defendant or at any rate the plaintiff had no knowledge that defendant was unauthorizedly using the said portion. Taking into consideration all these facts and circumstances I think that the finding recorded by the first appellate court that the plaintiff has failed to prove encroachment is not legal and correct. Once it is proved that the said portion is owned by the plaintiff landlord and defendant is not having right to utilise the same in any capacity but he is using the same, it has to be said that the said action of the defendant is not legal and correct and he has encroached on the rear portion. Therefore it is necessary to interfere with the finding recorded by the first appellate Court.

16. The appeal is allowed. The order passed by the 7th Additional District Judge,Pune in Civil Appeal No.128 of 1985 is set aside. The plaintiff’s suit for possession of encroached portion is decreed. The defendant to deliver possession of encroached portion to the plaintiff on or before 30-8-2004.

The appeal is allowed with costs.

. Certified copy expedited.

(S.R.SATHE, J.)

(Note: There is some Marathi version on page no.7 in this judgment, please reproduce the same while supplying copy of this judgment to the parties).